Murray Hiebert v Chandra Sri Ram

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO B-02-534 OF 1997, B-02-191 OF 1997, B-02-369 OF 1997 AND B-02-625 OF 1997
LAMIN PCA, AHMAD FAIRUZ AND DENIS ONG JJCA
11 SEPTEMBER 1999

Civil Procedure *— Contempt of court — Civil contempt, ingredients of — Test applicable — Whether there must be real risk of prejudice to administration of justice as opposed to remote possibility*

Civil Procedure *— Contempt of court — Committal proceedings — Disqualification of judge to hear on contempt — No application was made to disqualify judge — Whether issue of disqualification of judge should be raised at appellate stage — Whether trial judge should have disqualified himself since he was the 'alleged victim of appellant's conduct'*

Civil Procedure *— Contempt of court — Committal proceedings — Notice of motion lack particulars of grounds of alleged contempt — Grounds of contempt stated in statement supporting application for leave — Whether sufficient — Rules of the High Court 1980 O 52 r 2(2)*

Civil Procedure *— Contempt of court — Mens rea — Whether mens rea is essential ingredient of contempt of court*

Civil Procedure *— Locus standi — Failure to obtain Attorney General's consent — Respondent was successful party in appeal from which contempt proceeding arose — Whether respondent had locus standi to apply to commit appellant*

The appellant is the correspondent for the magazine Far Eastern Economic Review ('FEER') and was based in Kuala Lumpur. He is the author of an article entitled 'See You in Court' published in FEER ('the article'). The article, according to the respondent, inter alia, discusses the merits of a suit in which the respondent was the plaintiff. The respondent alleged that the contents of the article, when read as a whole, amounts to serious contempt of the court and an unwarranted attack upon the Malaysian Judiciary. Consequently, the respondent filed a notice of motion for an order that the appellant be committed to prison for his several contempts of the court in publishing the article. The High Court sentenced the appellant to three months' imprisonment. The appellant appealed. Among the issues raised were: (i) whether the notice of motion lack particulars of the grounds of the alleged contempt; (ii) whether the respondent had locus standi to apply to commit the appellant since the respondent had not obtained the Attorney General's consent to do so; (iii) whether the trial judge should have disqualified himself since he was the 'alleged victim of the appellant's conduct'; (iv) whether the correct test to be applied is that there must be a real risk of prejudice to the administration of justice as opposed to a remote possibility, which the appellant's counsel submitted the trial judge had failed to apply; and (v) whether mens rea is an essential ingredient of contempt of court.

Held, dismissing the appeal against conviction but reducing the sentence from three months' imprisonment to six weeks: A

(1) (per **Ahmad Fairuz JCA**) Order 52 r 2(2) of the Rules of the High Court 1980 requires the grounds of contempt to be stated in the statement supporting the application for leave. In this appeal, the appellant had done so. Further, the article has been exhibited by the affidavit. With the whole of the article and the particulars as contained in para 4 of the statement, the appellant was in a position to clearly know what was being alleged against him. As such, there were no merits in the learned appellant's counsel's submission on the issue of particulars (see p 332B, G); *Arthur Lee Meng Kwang v Faber Merlin (M) Bhd & Ors* [1986] 2 MLJ 193 followed and *Re B (JA) (An infant)* [1965] 1 Ch 1112 distinguished. B C

(2) (per **Ahmad Fairuz JCA**) Where the respondent has the locus standi, the Attorney General's consent is immaterial. The learned trial judge was right when he decided that the respondent had the locus standi to make the committal application since the latter was the successful party in the civil appeals from which the contempt proceeding arose. Therefore, the issue of consent of the Attorney General did not arise (see p 331E–H). D

(3) (per **Ahmad Fairuz JCA**) Since the affidavit evidence and the notes of proceedings before the trial court did not disclose anything that could indicate that an application to disqualify the trial judge was ever made, it was not appropriate for the appellant's counsel to raise this issue at the appellate stage (see p 332B–C). E

(4) (per **Ahmad Fairuz JCA**) The correct test applicable in contempt proceedings had been applied by the trial judge. The term 'real risk' introduced in *Reg v Duffy & Ors; ex p Nash* [1960] 2 QB 188 was never intended to qualify the tests used in earlier cases. Therefore, the trial judge was correct when he held that in order to constitute contempt of court, it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice. It is enough if it is likely or it tends in any way to interfere with the proper administration of justice (see p 332D–G); *PP v The Straits Times Press Ltd* [1949] MLJ 81; *PP v SRN Palaniappan & Ors* [1949] MLJ 246 and *Re Sin Poh Amalgamated Ltd & Ors* [1954] MLJ 152 followed. F G H

(5) (per **Ahmad Fairuz JCA**) The respondent had established beyond reasonable doubt a case of contempt of court against the appellant. Even applying 'the real risk test', a reading of the article as a whole would still show beyond reasonable doubt that the appellant had committed contempt. There were real risks of prejudice to a fair and proper trial of the respondent's pending suit. On the facts and circumstances in the appeals, the court was convinced that the only logical conclusion an ordinary and I

reasonable reader can come to is the very same conclusion arrived at by the learned trial judge (see pp 342D–E, 340A–B).

(6) (per **Ahmad Fairuz and Denis Ong JJCA**) It is no defence for the appellant to say that he did not know or think or intend the article to be contemptuous. Lack of intention or knowledge is no excuse, though it may have a great bearing on the punishment which the court will inflict. The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the author intended that result (see p 336B–D); *Reg v Odham Press* [1957] 1 QB 73 followed.

(7) (per **Denis Ong JCA**) Making allowances for the disputed paras 4, 6, 12 and 13 and taking into account paras 3, 5 and 9 and the effect of the article as a whole on the ordinary reasonable reader, the article constituted contempt of the High Court. The High Court was correct to have held that the article constituted contempt of court for two reasons: (a) because it was written in respect of proceeding in the suit which was subjudice and the respondent was the plaintiff; and (b) because it scandalized the High Court, contained threat, pressure and interference with the trial of the suit and is calculated to bring the High Court or the judge into disrespect or contempt or to lower or undermine his authority (see p 357B–C).

(8) (per **Denis Ong JCA**) One factor relevant to sentencing is the element of mens rea in the commission of the offence. Given his standing as a professional correspondent of FEER, the appellant had deliberately chose to venture perilously outside his limits. His case is not merely one of mistaken exercise of judgment. Another factor relevant to sentencing is the matter of apology. There was an expression of regret by the appellant given early in his affidavit. Taking all these into consideration, a term of six weeks imprisonment would suffice (see p 359H–360C).

[Bahasa Malaysia summary

Perayu merupakan seorang wartawan majalah Far Eatern Economic Review ('FEER') dan telah ditempatkan di Kuala Lumpur. Beliau adalah penulis kepada artikel bertajuk 'See You in Court' yang diterbitkan di dalam FEER ('artikel tersebut'). Artikel tersebut, menurut responden, antara lain, membincangkan merit-merit kepada suatu saman di mana responden merupakan plaintif. Responden mendakwa bahawa kandungan artikel tersebut, apabila dibaca secara keseluruhannya, berjumlah kepada suatu penghinaan mahkamah yang serius dan suatu serangan yang tidak wajar terhadap Kehakiman Malaysia. Akibatnya, responden telah memfailkan suatu notis usul untuk satu perintah agar perayu dipenjarakan kerana beberapa penghinaan mahkamah yang telah dilakukan oleh beliau di dalam menerbitkan artikel tersebut. Mahkamah Tinggi telah menjatuhkan hukuman tiga bulan penjara ke atas perayu. Perayu telah membuat

rayuan. Antara isu-isu yang telah ditimbulkan adalah: (i) sama ada notis usul itu kekurangan butiran tentang alasan-alasan terhadap dakwaan penghinaan itu; (ii) sama ada responden mempunyai locus standi untuk memohon untuk mensabitkan perayu memandangkan responden tidak memperoleh kebenaran Peguam Negara untuk berbuat demikian; (iii) sama ada hakim perbicaraan sepatutnya telah menarik diri dari penghakiman perbicaraan memandangkan beliau merupakan 'mangsa yang didakwa oleh sebab tindakan perayu'; (iv) sama ada ujian yang betul untuk digunakan adalah di mana mesti wujud suatu risiko sebenar prejudis terhadap pentadbiran keadilan bertentangan dengan suatu kemungkinan yang jauh, di mana peguam perayu telah menghujahkan bahawa hakim perbicaraan telah gagal memakainya; dan (v) sama ada mens rea merupakan unsur utama penghinaan mahkamah.

Diputuskan, menolak rayuan terhadap sabitan tetapi mengurangkan hukuman daripada tiga bulan penjara kepada enam minggu:

(1) (oleh Ahmad Fairuz HMR) Aturan 52 k 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 menghendaki alasan-alasan penghinaan perlu dinyatakan di dalam pernyataan yang menyokong permohonan kebenaran. Di dalam rayuan ini, perayu telah berbuat demikian. Selanjutnya, artikel tersebut telah dieksibitkan oleh afidavit itu. Dengan keseluruhan artikel tersebut dan butiran seperti mana yang terkandung di perenggan 4 kepada pernyataan itu, perayu adalah di dalam kedudukan yang jelas mengetahui apa yang didakwa terhadap dirinya. Oleh demikian, tiada merit di dalam penghujahan peguam perayu yang bijaksana tentang isu butiran itu (lihat ms 330B, G); Arthur Lee Meng Kwang v Faber Merlin (M) Bhd & Ors [1986] 2 MLJ 193 diikut dan Re B (JA) (An infant) [1965] 1 Ch 1112 dibeza.

(2) (oleh Ahmad Fairuz HMR) Di mana responden mempunyai locus standi, kebenaran Peguam Negara adalah tidak penting. Hakim perbicaraan yang bijaksana adalah betul apabila memutuskan bahawa responden mempunyai locus standi untuk membuat permohonan komital memandangkan beliau adalah pihak yang berjaya di dalam rayuan-rayuan sivil daripada mana prosiding penghinaan timbul. Oleh itu, isu tentang kebenaran Peguam Negara tidak timbul (lihat ms 331E–H).

(3) (oleh Ahmad Fairuz HMR) Memandangkan afidavit keterangan dan nota prosiding di hadapan hakim perbicaraan tidak mendedahkan apa-apa yang boleh menunjukkan bahawa suatu permohonan untuk tidak melayakkan hakim perbicaraan pernah dibuat, adalah tidak sesuai untuk peguam perayu menimbulkan isu ini di peringkat rayuan (lihat ms 332B–C).

(4) (oleh Ahmad Fairuz HMR) Ujian betul yang patut digunakan di dalam prosiding-prosiding penghinaan telah digunakan oleh hakim perbicaraan. Terma 'risiko sebenar' yang diutarakan di dalam R v Duffy; ex p Nash [1960] 2 QB 188 tidak pernah

bermaksud untuk menidakkan ujian-ujian yang digunakan di dalam kes-kes terdahulu. Oleh itu, hakim perbicaraan adalah betul apabila beliau memutuskan bahawa bagi tujuan terbentuknya satu penghinaan mahkamah, tidaklah perlu untuk membuktikan bahawa wujud satu gangguan sebenar dalam pentadbiran keadilan. Adalah mencukupi sekiranya ia berkemungkinan atau berkecenderungan di dalam apa cara mengganggu pentadbiran keadilan yang betul (lihat ms 332D–G); PP v The Straits Times Press Ltd [1949] MLJ 81 dan PP v SRN Palaniappan & Ors [1954] MLJ 152 diikut.

(5) (oleh Ahmad Fairuz HMR) Responden telah membuktikan di luar keraguan munasabah suatu kes penghinaan mahkamah terhadap perayu. Begitu juga dengan menggunakan 'ujian risiko sebenar', dengan membaca artikel tersebut secara keseluruhannya akan masih menunjukkan di luar keraguan munasabah bahawa perayu telah melakukan penghinaan. Wujud risiko sebenar yang prejudis kepada suatu perbicaraan yang adil dan betul terhadap responden sementara menunggu perbicaraan. Berdasarkan fakta dan keadaan di dalam rayuan-rayuan itu, mahkamah telah berkeyakinan bahawa satu-satunya kesimpulan logik yang boleh dicapai oleh seorang pembaca yang biasa dan waras adalah kesimpulan yang sama seperti yang dicapai oleh hakim perbicaraan yang bijaksana (lihat ms 342D–E, 340A–B).

(6) (oleh Ahmad Fairuz dan Denis Ong HHMR) Tiada pembelaan untuk perayu mengatakan bahawa beliau tidak berpengetahuan atau berfikiran atau bermaksud untuk menjadikan artikel tersebut berbau penuh kebencian. Kekurangan niat atau pengetahuan bukanlah alasan, walaupun ia mungkin mempunyai kesan yang besar ke atas hukuman yang akan dikenakan oleh mahkamah. Ujian adalah sama ada perkara yang diadukan boleh dikira sebagai campur tangan dengan arus keadilan, bukanlah sama ada penulis bermaksud akan akibat itu (lihat ms 336B–D); Reg v Odham Press [1957] 1 QB 72 diikut.

(7) (oleh Denis Ong HMR) Dengan memberikan kelonggaran untuk perengan-perenggan 4, 6, 12 dan 13 yang dipertikaikan dan mengambilkira perenggan-perenggan 3, 5 dan 9 dan kesan artikel tersebut keseluruhanya ke atas seorang pembaca biasa yang waras, artikel tersebut membentuk suatu penghinaan kepada Mahkamah Tinggi. Mahkamah Tinggi adalah betul di dalam memutuskan bahawa artikel tersebut membentuk suatu penghinaan mahkamah kerana dua sebab: (a) kerana ia telah ditulis mengenai prosiding di dalam saman yang subjudice di mana responden merupakan plaintif; dan (b) kerana ia telah menghina Mahkamah Tinggi, mengandungi ugutan, tekanan dan gangguan dengan perbicaraan saman itu dan dikira telah membawa Mahkamah Tinggi atau hakim itu kepada sikap tidak hormat atau menghina atau merendah atau menjejaskan kuasa beliau (lihat ms 357B–C).

(8) (oleh Denis Ong HMR) Satu fakta yang relevan kepada hukuman adalah elemen mens rea di dalam perbuatan melakukan kesalahan itu. Dengan kedudukan beliau sebagai seorang penulis profesional FEER, perayu telah dengan sengaja memilih untuk menanggung risiko di luar batasannya. Satu lagi fakta relevan kepada hukuman adalah mengenai meminta kemaafan. Wujud satu penyataan kesal oleh perayu yang diberi di permulaan afidavit beliau. Dengan mengambilkira semuanya ini, tempoh enam minggu penjara adalah mencukupi (lihat ms 359H–360D).]

Notes

For cases on contempt of court, 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue), see 1083–1166.

For cases on locus standi, 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue), see 3083–3118.

Cases referred to

A-G v Sport Newspapers Ltd & Ors [1992] 1 All ER 503 (refd)
A-G v Times Newspapers Ltd [1974] AC 273 (refd)
Ambard v AG for Trinidad and Tobago [1936] AC 322 (refd)
Arthur Lee Meng Kwang v Faber Merlin (M) Bhd & Ors [1986] 2 MLJ 193 (folld)
Attorney General v Fred Zimmerman & Ors [1986] 2 MLJ 89 (refd)
Attorney General v Pang Cheng Lian & Ors [1975] 1 MLJ 69 (refd)
Attorney General v Wain & Ors (No 1) [1991] 2 MLJ 525 (refd)
Attorney General, Malaysia v Manjeet Singh Dhillo [1991] 1 MLJ 167 (refd)
B (JA) (An infant), Re [1965] 1 Ch 1112 (distd)
Brig ET Sen (Retd) v Edatata Narayanan & Ors 1969 AIR Delhi 201 (refd)
Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors [1960] 3 All ER 289 (refd)
Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240 (refd)
Chokolingo v A-G of Trinidad & Tobago [1981] 1 All ER 244 (refd)
Crown Bank, Re; Re O'Malley (1890) 44 Ch D 649 (refd)
Daw v Eley (1868) LR 7 Eq 49 (refd)
Delbert-Evans v Davies and Watson [1945] 2 All ER 167 (refd)
Government of Malaysia v Lim Kit Siang & United Engineers (M) Bhd v Lim Kit Siang [1988] 2 MLJ 12 (refd)
Hunt v Clarke (1889) 58 LJQB 490 (refd)
Jones, Ex p (1806) 13 Ves 237 (refd)
Karam Singh Veriah v Karpal Singh [1988] 2 MLJ 603 (refd)
Lee Kee Choong v Empat Nombor Ekor (NS) Sdn & Ors [1976] 2 MLJ 93 (refd)
Lim Kit Siang v Dato Seri Mahathir Mohamad [1987] 1 MLJ 383 (refd)
Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar [1989] 2 MLJ 281 (refd)

PC Sen, Re Criminal Appeal No 119 of 1966 (refd)
PP v SRN Palaniappan & Ors [1949] MLJ 246 (folld)
PP v The Straits Times Press Ltd [1949] MLJ 81 (folld)
R v Bolam; ex p Haigh (1949) 93 SJ 220 (refd)
R v Duffy; ex p Nash [1960] 2 QB 188 (refd)
R v Thomson Newspapers Ltd & Ors; ex p Attorney General [1968] 1 All ER 268 (refd)
Read & Huggonson (St Jame's Evening Post Case), Re (1742) 2 Atk 469 (refd)
Reg v Duffy & Ors; ex p Nash [1960] 2 QB 188 (refd)
Reg v Odham Press Ltd & Ors; ex p Attorney General [1957] 1 QB 73 (folld)
Roach v Garvan (1742) 2 Alk 469 (refd)
Sin Poh Amalgamated Ltd & Ors, Re [1954] MLJ 152 (folld)
Thakur Jugal Kishore Sinha v The Sitmarlin Central Co-operative Bank Ltd AIR 1967 SC 1494 (refd)
Queen, The v Gray [1900] 2 QBD 36 (refd)
William Thomas Shipping Co Ltd, Re [1930] 2 Ch 368 (refd)

Legislation referred to

Contempt of Court Act 1981 [UK]
Federal Constitution art 8
Contempt of Courts Act 1952 [India]
Rules of High Court 1980 O 52 rr 2(2), 4

Cecil Abraham and *Muhammad Shafee Abdullah* (*Gurmeet Kaur Sidhu*, *K Rajasegaran* and *Chong Wee Wong* with them) (*Shafee & Co*) for the appellant.

Kam Woon Wah (*Edward TK Kam* with him) (*Syarikat Kam Woon Wah*) for the respondent.

RR Chelvarajah and *Mah Weng Kwai* watching brief for the Bar Council.

Lamin PCA: On the various issues raised, with respect, I am inclined to agree with the views expressed by my learned brother judge Ahmad Fairuz JCA. However I concur with both my brother judges Ahmad Fairuz and Denis Ong JJCA on the questions of conviction and sentence and also on the cost of this appeal.

Ahmad Fairuz JCA: These are appeals from an order of the High Court Malaya at Shah Alam ('the said court') ordering the appellant to be imprisoned for three months for contempt of court and further ordering him to pay the costs of the proceedings (see Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240 (HC)).

The appellant is a journalist. He is the Far Eastern Economic Review's ('FEER') correspondent based in Kuala Lumpur. He is the author of an article entitled 'See You in Court' published in FEER in the edition of 23 January 1997. The article, according to the respondent, inter alia, discusses the merits of a suit in which the respondent was the plaintiff and Julie Dean with Gail A Vendeland (sued as Chairman and on behalf of the

Society for the International School of Kuala Lumpur) as defendant. The respondent alleges that the contents of the article, when read as a whole, amounts to serious contempt of the said court and an unwarranted attack upon the Malaysian Judiciary. Consequently, the respondent made an ex-parte application for leave of the said court to issue a committal order against the appellant for contempt of court. Leave was granted by the said court. Pursuant to that leave, the respondent filed the notice of motion dated 4 February 1997. The motion seeks, inter alia, for an order that:

(1) the appellant be committed to prison for his several contempts of the said court in publishing in the issue of the FEER dated 23 January 1997, an article under the heading 'See You in Court', and

(2) the costs of and occasioned by the application be paid by the respondent.

Particulars

This notice of motion, according to the learned appellant's counsel, lacks particulars of the 'several contempts' of the said court. The respondent contended otherwise. Both parties submitted several authorities in support of their respective contentions.

A perusal of the notice of motion will show that prayer (1) therein states that the particulars of the 'several contempts' are set out in the Statement which is found at p 195 of the appeal record (AR). The heading of the statement reads 'Statement pursuant to O 52 r 2(2) Rules of High Court 1980'. Order 52 r 2(2) reads:

> An application for such leave must be made ex parte to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a *statement setting out* the name and description of the applicant, the name, description and address of the person sought to be committed and the *grounds* on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on. (Emphasis added.)

The grounds required by O 52 r 2(2) Rules of the High Court are found in para 4 of the Statement which is as follows:

> The grounds upon which relief is sought against respondent are that the said article, when read as a whole:
>
> (a) Scandalizes this Honourable Court;
>
> (b) Is calculated to excite prejudice against the plaintiff and the litigation in Civil Suit No 22-210-96, presently being tried before this Honourable Court?
>
> (c) Is designed to exert pressure upon this Honourable Court to decide the said suit against the plaintiff.

The last paragraph of the notice of motion states:

> And further take notice that *the applicant intends to read and use at the hearing of this motion* the affidavit of Chandra Sri Ram affirmed on 28 January 1997 and the statement dated 29 January 1997 filed heretofore proving the said

A contempt, a copy of which affidavit with *the Statement* are served with this notice of motion.

And the respondent's affidavit (see p 296 AR) exhibits the article in question as 'A-2'.

Despite the facts as found in the documents described above, the B learned appellant's counsel argued that the notice of motion in a committal matter must set out the grounds of the alleged contempt. The absence of such grounds, according to the learned counsel, would be deemed as a fatal defect. In support of his contention, he referred to the case of *Arthur Lee Meng Kwang v Faber Merlin (M) Bhd & Ors* [1986] 2 MLJ 193 ('the *Arthur Lee*'s case'). This case, according to the learned counsel, quoted with C approval the following passage from the English case of *Re B (JA) (An infant)* [1965] 1 Ch 1112:

> Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged D against him and has every opportunity to meet the allegations. For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; ...
>
> It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case E no harm may have been done ... In the same way, as is shown by *Taylor v Roe*, if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of motion, that is a fatal defect, even though the defendant gets to know everything before the motion comes on, and indeed answers the affidavits.

F It is indisputable that the above-quoted passage from the case of *Re B (JA) (An infant)* shows that the notice of motion must set out the grounds upon which he is said to be in contempt. There is however nothing in the judgment of the case to indicate under which court rules the notice of motion was made although the judgment shows that the relevant proceeding began in January 1965. Assuming that the Rules of the Supreme G Court 1965 (which came into operation on 1 October 1966) applies, I quote herewith the relevant provision of O 52 r 4 of that rule which reads:

> (1) Where an application for an order of committal may be made to a Court other than a Divisional Court, the application must be made by motion and be supported by an affidavit.
>
> H (2) Subject to para (3), the notice of motion, stating the grounds of the application and accompanied by a copy of the affidavit in support of the application, must be served personally on the person sought to be committed.
>
> (3) Without prejudice to its powers under O 65 r 4, the Court may dispense with service of the notice of motion under this rule if it thinks it just to do I so.

The relevant Rules of the Supreme Court immediately prior to the 1965 Rules provided through O 52 r 4 thus:

> *Every notice of motion* for attachment or *for an order of committal, shall state in general terms the grounds* of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.

It is therefore obvious that the notice of motion, under English law, must set out the grounds. Our O 52 r 2(2) Rules of the High Court requires *the grounds to be stated in the statement* supporting the application for leave. And in this appeal, the appellant had done so. Consequently, the case of *Re B (JA) (An infant)* does not apply to the facts pertaining to the issue of lack of particulars in the appeals before this court.

In *Arthur Lee*'s case, the issue of lack of particulars was taken up as a substantive objection. At p 194 of the report, Mohamed Azmi SCJ (as he then was) said:

> On substantive objections, the three defects alleged are:
>
> (1) The complainants have no locus standi.
>
> (2) There was an adjudication on 4 July 1985 and the order granting leave was a nullity for the reasons set out in the affidavit.
>
> (3) The charge has not been sufficiently particularized.

At p 196, Mohamed Azmi SCJ, (as he then was) said:

> ... Lastly, as regards the complaint that the charge in the statement is defective in that it lacks particulars, we note that the alleged contempt in the statement is in the writing of the four letters by the advocate himself to the appellate judges either directly or copied to them and others. Having regard to the contents of the letters which are referred to in the statement and exhibited in the verifying affidavit, we find it is sufficient for the advocate to know what the alleged contempt is against him, and to enable him to meet the charge and prepare his defence.

The above-quoted passages from the judgment of Mohamed Azmi SCJ demonstrate how accurate the learned respondent's counsel is when he submitted that the facts of these appeals on the issue of particulars fall squarely within the decision of *Arthur Lee*'s case. In the appeals before this court an article is involved. And the article has been exhibited by the affidavit. With the whole of the article and the particulars as contained in para 4 of the statement, I am confident that the appellant is in a position to clearly know what is being alleged against him. As such, I hold that there are no merits in the learned appellant's counsel's submission on the issue of particulars.

Locus standi

The second issue raised by the learned appellant's counsel pertains to the respondent's locus standi to make the committal application. The learned counsel submitted that the learned trial judge made a fundamental error in law when he relied on the dicta in *Arthur Lee*'s case without reading the same together with the dicta in *Government of Malaysia v Lim Kit Siang & United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12 ('the *Lim Kit Siang*'s case'). This is so required by the case of *Malaysian Bar v Tan Sri*

Dato Abdul Hamid bin Omar [1989] 2 MLJ 281, at p 282 wherein the Supreme Court said:

> ... In a proceeding for contempt the qualification of 'sufficient interest' in *Arthur Lee Meng Kwang v Faber Merlin (M) Bhd & Ors* must be read together with the majority judgment in *Lim Kit Siang*'s.

The appellant's counsel then quoted a passage from the judgment of Salleh Abas LP (Malaya) (as he then was) in *Lim Kit Siang*'s case which reads at p 20:

> ... On the other hand, any other person, however public spirited he may be, will not be able to commence such litigation, unless he has locus standi or in the absence of it, he has obtained the aid or consent of the Attorney General.

The learned counsel also cited the following passage from the judgment of Abdul Hamid CJ (Malaya) (as he then was) at p 27:

> ... Second, where a private plaintiff relies on an interest in the enforcement of a public right and not of a private right, standing will be denied unless the Attorney General consents to a relator action ...

The learned counsel then urged this court to hold that the respondent's application to commit the appellant was clearly bad as the respondent had failed to obtain the Attorney General's consent.

The learned counsel for the respondent also referred this court to the very same passage quoted by the appellant's counsel from the judgment of Salleh Abas LP in *Lim Kit Siang*'s case. Referring to this passage, the respondent's counsel laid emphasis on the words 'unless he has a locus standi, or in the absence of it ...'. Based on this emphasis, it is clear that if the respondent has the locus standi, then the Attorney General's consent is immaterial. Hence, I am of the view that the learned trial judge was right when he decided that the respondent had the locus standi to make the committal application on the strength of the Supreme Court's decision in *Arthur Lee*'s case. The learned trial judge had rightly relied on the following passage from Mohamed Azmi SCJ's judgment in *Arthur Lee*'s case at p 196:

> ... When the contempt is not committed in the face of the court, as is the case alleged here, it is equally important that the dignity and integrity of the court be protected and preserved, and in such cases the contempt proceedings may be initiated by motion either by the Attorney General or any private party who has sufficient interest in the matter, or even by the court itself although in practice it seems unjust to expect the court to protect itself by being both complainant and judge, save in the unlikely event of the Attorney General or the appropriate private party declining to act. In this case, the complainants are the successful parties in the two civil appeals, from which the present contempt proceeding arose. Surely, the complainants and their advocates and solicitors have sufficient interest in this matter to give them locus standi.

Disqualifying the trial judge

The third issue taken up by the appellant's counsel was on the matter of the learned trial Judge hearing the contempt case himself. It was contended by the learned counsel that the trial judge should not have heard the contempt

proceeding himself. This is because the trial judge himself is the 'alleged victim of the appellant's conduct'. As such, the trial judge could not have decided the appellant's allegations impartially.

The respondent's counsel cited the cases of *Karam Singh Veriah v Karpal Singh* [1988] 2 MLJ 603 and *Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar* to support his contention that the trial judge could himself hear the committal proceedings. The learned counsel also highlighted the fact that there was no application made to disqualify the trial judge. Consequently, it is not appropriate for the appellant's counsel to raise this issue at the appellate stage. I agree with the respondent's counsel. Furthermore, the affidavit evidence and the notes of proceedings before the trial court do not disclose anything that could indicate that an application to disqualify the trial judge was ever made. As such, I am of the view that this contention of the appellant's counsel is also without merit.

Merits — test for contempt

On the merits of the committal application, the learned appellant's counsel submitted that the learned trial judge had applied the wrong test for contempt. He referred this court to p 117 of the appeal record wherein the learned trial judge, in his judgment, stated at p 271 of Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240 (HC):

> To constitute contempt of court, it is not necessary to prove affirmatively that there had been an actual interference with the administration of justice by reason of offending statements. It is enough if it is likely or it tends in any way to interfere with the proper administration of justice (per Dua CJ in *Brig ET Sen (Retd) v Edatata Narayanan & Ors* 1969 AIR Delhi 201).

The appellant's counsel contended that the test used by the learned trial judge is wrong. According to him, the correct test is that expressed by Lord Parker CJ in *Reg v Duffy & Ors; ex p Nash* [1960] 2 QB 188 at p 200, namely that there must be a real risk of prejudice to the administration of justice as opposed to a remote possibility. This test, according to counsel, was adopted by Lord Reid in *A-G v Times Newspapers Ltd* [1974] AC 273 at p 298G. The learned counsel also referred this court to several other English decisions to support his contention.

The learned respondent's counsel submitted that the learned trial judge had applied the correct test. He referred this court to the cases of *PP v The Straits Times Press Ltd* [1949] MLJ 81; *PP v SRN Palaniappan* & Ors[1949] MLJ 246 and *Re Sin Poh Amalgamated Ltd & Ors* [1954] MLJ 152. The learned respondent's counsel also made reference to several cases from Singapore, Australia, India, England and Canada.

I agree with the learned appellant's counsel that India has a Contempt of Court Act. The case of *Brig ET Sen (Retd) v Edatata Narayanan & Ors* 1969 AIR Delhi 201, which was relied upon by the learned trial judge in his judgment, in fact, involves the Indian Contempt of Courts Act 1952. However, Dua CJ in his judgment, referred to the case of *Thakur Jugal Kishore Sinha v The Sitmarlin Central Co-operative Bank Ltd* AIR 1967 SC 1494, wherein the Indian Supreme Court observed, inter alia, that the Indian Contempt of Courts Act 1952 does not define 'contempt'. Dua CJ,

also referred to a judgment of a Bench of three judges of the Supreme Court in the case of *Re PC Sen*, Criminal Appeal No 119 of 1966, in which Shah J, made reference to the English case of *The Queen v Gray* [1900] 2 QBD 36 at p 40. Dua CJ then said (at p 210 of the report):

> The same Bench of the Supreme Court has still more recently in *Perspective Publications (P) Ltd v State of Maharashtra*, Criminal Appeal No 159 of 1966 (SC), affirmed the order of the Bombay High Court convicting the appellants there of contempt of Mr Justice Tarkunde of that High Court in his judicial capacity and of the court. The charge of contempt was based on the publication on 24 April 1965 of an article under the caption 'STORY OF A LOAN and Blitz Thakersey Libel Case' in the weekly periodical called 'Mainstream'. That article was stated to have been contributed by a person under the name of 'Scribbler'. The court again reviewed the case-law. The American and Australian decisions were held to be hardly of much assistance in India because the decisions of the various High Courts and of the Supreme Court have crystallized the principles applicable here by mostly adopting the principles followed by English Courts. In this decision, it is again pointed out, by making a reference to *Brahma Prakash*'s case [1953] SCR 1169: AIR 1954 SC 10, which may by now be considered to be incontrovertible, that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of offending statements and it is enough if it is likely or it tends in any way to interfere with the proper administration of justice.

It is therefore clear that the Indian case of *ET Sen v E Narayanan* is merely echoing the principles followed by English courts. In the case of *R v Duffy* Lord Parker CJ at p 200 of the report said:

> The question always is whether a judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected. In other words, was there a real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing?

Prior to this statement, Lord Parker CJ (at p 196) said:

> The next question is as to what matter constitutes a contempt of court, and in what circumstances the court will issue a writ of attachment. In *Rex v Parke* [1903] 2 KB 432, Wills J, who delivered the judgment of the court consisting of Lord Alverstone CJ, Channel J and himself, said (ibid 436, 437):
>
> > 'The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists — namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned.'
>
> ... Thus, in *Reg v Payne [1896] 1 QB 577; 12 TLR 321*, Lord Russel of Killowen CJ said at p 580:
>
> > '... Every libel on a person about to be tried is not necessarily a contempt of court; but the applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending.'

In the same case, Wright J in agreeing with Lord Russel of Killowen CJ, said at p 581: A

> '... If the publication is found to be *likely to interfere with a fair trial*, a second question arises, whether, under the circumstances of the case, the jurisdiction which the court in that case possesses ought to be exercised, not so much for punishment as for preventing similar conduct in the future. That is the rule which I wish to adopt with regard to applications of this nature.' B

Words to much the same effect were used by Lord Goddard CJ in *Reg v Odhams Press Ltd [1957] 1 QB 73, 80; [1956] 3 WLR 796; [1956] 3 All ER 494* where he said:

> 'The test is whether the matter complained of is calculated to interfere with the course of justice ...' C

Accordingly, the question in every case is whether, in all the circumstances existing at the date of publication, including the content and form of the article, the circulation of the paper in which it appears, and the state of the proceedings, the article was intended or calculated to prejudice the fair hearing of the proceedings. D

What is clear from the earlier part of the judgment of Lord Parker CJ is his emphasis that the test is whether the article 'was intended or calculated to prejudice the fair hearing of the proceedings'. Later, when he made reference to the case of *Delbert-Evans v Davies and Watson* [1945] 2 All ER 167, Lord Parker CJ said at p 199: E

> ..., but the test is not whether harm has resulted but whether at the date of publication the article in question was calculated to prejudice the fair hearing of the proceedings.

It is only towards the end of his judgment that Lord Parker CJ uses the terms 'a real risk, as opposed to a remote possibility'. I note that the cases F which Lord Parker CJ referred to before he introduced the terms of 'real risk' never even implied the qualification of such terms to the test used in those cases. The first case referred to by Lord Parker CJ was a 1903 case (ie *Rex v Parke*). The next case he referred to was *Reg v Payne*, which is an 1896 case. The other case was *Reg v Odhams Press Ltd* which is a 1956 case. The last case that Lord Parker referred to was a 1945 case of *Delbert-Evans v* G *Davies & Watson*. As to the years in which these cases were decided, I am reminded of the case of *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167, wherein the learned Mohamed Yusoff SCJ said (at pp 177–178):

> The Supreme Court has this far consistently applied the common law H principle of contempt of court as seen in the judgments in some of these cases, viz: *A-G & Ors v Arthur Lee Meng Kuang, Lim Kit Siang v Dato Seri Dr Mahathir Mohamed* [1987] 1 MLJ 383, and as recently as this year in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and another application* [1990] 1 MLJ 273. All these three cases dealt with contempt in scandalizing the court. I see no reason now to depart from these I principles. Further, the common law, as has been expounded, applied and decided by our courts after 7 April 1956, by virtue of the Civil Law Act 1956, has become part of our law.

A ... On the law applicable to this case, I agree with the Attorney General that, as mentioned earlier, the principle of common law of contempt as stated in *R v Gray* [1900] 2 QB 36 still applies in our country. Parliament has not imposed any restriction by law relating to contempt of court under art 10(2) of the Constitution. As such, the common law provision under s 3 of the Civil Law Act 1956 is preserved.

B Section 3(1) of the Civil Law Act 1956 reads:

Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7th day of April
C 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force
D in England on the 12th day of December 1949, subject however to subsection 3(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such
E qualifications as local circumstances render necessary.

What is important to note here is the fact that the common law to be applied are the ones administered in England on 7 April 1956. The four cases referred to by Lord Parker CJ are obviously cases prior to 1956. As to the importance of the year 1956, the Privy Council in *Lee Kee Choong v Empat*
F *Nombor Ekor (NS) Sdn & Ors* [1976] 2 MLJ 93 at p 95 observed:

... For present purposes, it appears that the Civil Law Ordinance 1956, s 3, adopted English law as administered at its effective date, so that any subsequent march in English authority is not embodied.

Reverting to the term 'real risk', it is useful to observe that Spenser-
G Wilkinson J in *PP v The Straits Times Press Ltd* [1949] MLJ 81 when considering whether the letter before him was contemptuous said at p 83:

Considering the letter as a whole I have come to the conclusion that it tended to prejudice the fair disposal of the criminal proceedings before this court and was therefore a contempt of court.

H In another case, that is, *PP v SRN Palaniappan & Ors* [1949] MLJ 246 Spenser-Wilkinson J said at p 248:

There is, therefore, ample authority for the proposition that publications which contain attacks upon the judges in their judicial capacity or which tend to bring into contempt the administration of justice generally are contempts
I of court even though proceedings are not pending.

Murray-Aynsley CJ in *Re Sin Poh Amalgamated Ltd & Ors* [1954] MLJ 152 said (at p 153):

> ... coming to the present cases, it should be observed that the court is only concerned with the publications in so far as they tend to prejudice the criminal proceedings against 48 persons.

In the light of the aforesaid authorities, I respectfully agree with the view of the learned respondent's counsel that the test as set out by the learned trial judge is the correct test and the correct position of the law in Malaysia.

Merits — mens rea

As to the issue of whether mens rea is a necessary ingredient of contempt, I need only to refer to *Reg v Odham Press Ltd* & Ors; ex p Attorney-General [1957] 1 QB 73 at p 74 wherein Lord Goddard CJ, after examining the cases of *Re William Thomas Shipping Co Ltd* [1930] 2 Ch 368; *Roach v Garvan* (1742) 2 Alk 469 and *Ex parte Jones* (1806) 13 Ves 237 said at p 80:

> These cases clearly show that lack of intention or knowledge is no excuse, though it may have a great bearing on the punishment which the court will inflict and, in our opinion, they dispose of the argument that mens rea must be present to constitute a contempt of which the court will take cognizance and punish. The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know that the matter was defamatory and had no intention to defame.

Obviously, therefore, the appellant's contention on this issue is without merit.

Merits — the article itself

The next matter taken up on behalf of the appellant was on the finding of the trial judge on para 3 of the article which reads:

> The case has sparked intense interest among legal circles, educators and foreign investors in the Malaysian capital. For starters, the thin, bespectacled student, Govind Sri Ram, is the son of a prominent Court of Appeal judge, Gopal Sri Ram. And many are surprised at the speed with which the case raced through Malaysia's legal labyrinth. The trial began on 6 January, less than seven months after a writ was filed with the High Court. 'Normally, in a civil case, you're lucky to get a hearing within five years,' a veteran lawyer notes.

This paragraph, according to the learned trial judge at p 259–260:

> ... was calculated to give rise to a reasonable and objective impression on an ordinary reasonable reader of average intelligence that our High Court had been manipulated or influenced by Dato' Gopal Sri Ram because he is a prominent judge of the Court of Appeal Judge.

The learned trial judge is of the view that the appellant 'had indeed sought to show in para 3 that this High Court was not fair and as a result, had helped the plaintiff by giving an early hearing date for the civil suit because his father is a judge of the Court of Appeal. The learned trial judge also held that the appellant:

A

> ... had surreptitiously portrayed a picture that the whole proceedings in the civil suit had been short-circuited in order to accommodate a judge of the Court of Appeal , when actually that was not the case here.

Finally the learned trial judge concluded:

B

> I am of the view that para 3 was both scandalous and contemptuous in that it sought to attack the fundamental integrity of this court.

The appellant's counsel contended that para 3 does not satisfy the test of 'scandalizing the court' as established in the case of *Chokolingo v A-G of Trinidad & Tobago* [1981] 1 All ER 244. In that case, Lord Diplock (at p 248) said:

C

> ... Scandalizing the court' is a convenient way of describing a publication which, although it does not relate to any specific case either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice.

D Even if the trial judge were to use this test, I am of the view that he would come to the same conclusion. The wordings in the paragraph are, to my mind, so crystal clear that they cannot give rise to any other meaning or inference or impression other than that that had been given by the learned trial judge on them.

E The next attack of the learned appellant's counsel pertains to the learned trial judge's finding on para 4 of the article which reads:

> The main point of interest for lawyers is that the case is breaking new legal ground. 'It is the first time in Malaysian history that someone is suing on the basis of unfair discrimination,' notes one. 'Malaysia has no laws on discrimination.'

F This paragraph, in the opinion of the learned trial judge, is a lie. After making references to art 8 of the Federal Constitution and several reported decisions of the Federal Court and the Supreme Court, the learned trial judge held that:

G

> ... the statement by the respondent in para 4, particularly his allegation that Malaysia has no laws on discrimination, was a baseless lie, by which the respondent had portrayed a false picture that notwithstanding the absence of the law on discrimination, this High Court still proceeded to hear the case.

The learned appellant's counsel contends that para 4 is a layman's genuine mistake as to the law. To this, the learned respondent's counsel referred this H court to para 12 of the appellant's affidavit-in-reply which disclosed as follows:

> I should add that my article was read for libel and contempt by a senior lawyer in Kuala Lumpur on 13 January, and then approved by a media law specialist lawyer in Hong Kong. I did not, in view of their advice, imagine that the article would ever be made the subject of contempt proceedings.

I

This paragraph shows, as contended by the learned respondent's counsel, that it is not possible for the appellant to say that he does not know the law.

I agree with the learned counsel. Consequently, there is also no merit in this contention of the appellant.

The next issue taken up by the appellant is on para 5 of the article which reads at p 264:

> Educators are also following the case closely. A hefty award for the plaintiff would be a major financial burden on the school — and could hinder Malaysia's efforts to attract foreigners. The institution, after all, was established 30 years ago to educate the children of foreign businessmen and diplomats (young Govind is among the 7% of the school's 1,650 students who are Malaysian citizens, most admitted because their parents have spent years working overseas).

The learned trial judge is of the view that:

> ... this paragraph contains threat and intimidation to this court in that if this court were to hand down a hefty award, foreign investors will be driven away. A threat and intimidation of this nature and in this direction, particularly in pending proceedings, was clearly calculated to divert the course of justice and therefore interfered with the due process of law and the course of justice, in that this court should be hesitant to find in favour of the plaintiff in the civil suit by suggesting Malaysia's economic interest is at stake. The respondent is indeed literally pressing this court so as to achieve the purpose of asking this court to throw out the plaintiff's suit so that foreign investment in Malaysia would not be jeopardized.

According to the learned appellant's counsel, no reasonable reader of the article would have arrived to such a view as held by the learned trial judge. The case of *Carl-Zeiss-Stiftung v Rayner & Keeler* Ltd & Ors [1960] 3 All ER 289 submitted by the appellant's counsel, at p 295, makes reference to *Daw v Eley* (1868) LR 7 Eq 49 which deals with the issue of whether a solicitor for one of the parties to a pending patent proceedings is guilty of contempt of court when he wrote a letter under an assumed name, which was published in a newspaper. The letter stated facts tending to disprove the novelty of the invention of the other party which is in fact one of the issues raised in the patent proceeding. These concise facts show a parallel to the facts in the appeals before this court. The appellant is, of course, not a solicitor. But the appellant's wife is the assistant to the headmaster of the school which is a party to the respondent's suit. Paragraph 5 of the article talks of damages to be awarded. Paragraphs 2 and 7 of the article clearly reveal that the respondent is seeking damages from the appellant. In other words, damages is an issue in the appeals as the novelty of a party's invention is an issue in the patent proceedings in *Daw*'s case. The court in *Daw*'s case held the solicitor to be guilty of contempt in writing that letter. Lord Romilly MR, in *Daw*'s case, says, inter alia:

> The principle is quite established in all these cases, that no person must do anything with a view to pervert the sources of justice or the proper flow of justice; in fact they ought not to make any publications, or to write anything, which would induce the court, or which might possibly induce the court, or the jury, the tribunal that will have to try the matter, to come to any conclusion other than that which is to be derived from the evidence in the cause between the parties; and certainly they ought not to prejudice the minds of the public

> beforehand by mentioning circumstances relating to the case. Now, if that is done with the intention of perverting the ends of justice, there is no question that the court would stop it, and very often the court will judge for itself what are the fair inferences to be derived from the publications which appear; but it must also go beyond this; it must stop the publication where the evident result would be to affect the administration of justice, though that might not have been the intention of the person who did it. In this case, the main question to be tried is the novelty of the plaintiff's invention; ... Then it is to be observed that this is written, not by a mere stranger, who might say that he really knew nothing at all about the cause, but it is written by the solicitor of the gentleman who is opposed to Mr Daw in this suit. Surely, that is a very strong feature in the case; he must wish that his client should succeed; and I venture to say that there is no solicitor who would not in the same position feel the same thing; and it is impossible that a solicitor can safely act in a matter of this description in writing an article in a paper which, if believed, must have a beneficial effect upon his client, and afterwards say: 'I had no intention of that sort at all, however much I may wish for it'. It must be regarded as an endeavour to interfere with the due administration of justice ... There is one distinct line drawn, which is this, that gentlemen who are concerned for contending clients in this court, whether solicitors or counsel, should abstain entirely from discussing the merits of those questions in public print; if they do it at all, they ought to put their names to their communications; but to let the public suppose that it is merely done by a person who takes a great interest in, and has great knowledge of the subject, and discusses it from a public point of view, when, if the fact were known, he is the solicitor of the defendant, and has the strongest possible interest in his success, is in my opinion, highly reprehensible ... The perusal of the articles confirms me in the view I have taken, and it must be admitted by everybody to be an extremely improper thing for a solicitor in the cause to write an article in a paper which may either directly or indirectly influence the suit upon which he is engaged. ... With regard to Mr Collete the order will be that Mr Collete stands committed for contempt of this court.

At this juncture, I feel it appropriate to quote a passage from Blackburn J's judgment in *Skipworth's case* (1873) LR 9 QB 230 at pp 232–233, which is as follows:

> ... When a case is pending, whether it be civil or criminal, in a court it ought to be tried in the ordinary course of justice, fairly and impartially ... Now, it may happen, and in many cases does happen, that persons interfere for the purpose of preventing that ordinary course of justice. There are many decided cases in which such an attempt has been made; sometimes it has been done by an attack upon the judge, though comparatively rarely. Sometimes it has been done by trying to induce the judge to change his opinion by flattery, and even in some cases by offering bribes to him. There have been attempts made to change the ordinary course and cause the judge to take a particular view of the matter. More commonly, the mode adopted has been that of an attempt to influence the trial by attacking, deterring, and frightening witnesses, or by commenting on the case, or, as it is called, appealing to the public, and endeavouring, by statements made ex parte, without the other side being heard, and without the means of testing the matter which the law requires, to prejudge the case and prejudice the trial; and in all those ways great mischief may be done by interfering with the due and ordinary course of law, and causing justice, whether criminal or civil, not to be administered in the way which is ordinarily pursued.

Skipworth's case was referred to in *A-G v Sport Newspapers Ltd* & Ors [1992] 1 All ER 503 which was submitted by the appellant's counsel.

Applying these aforementioned authorities to the facts and circumstances in these appeals convinced me that the learned respondent's counsel is right when he submitted that the only logical conclusion an ordinary and reasonable reader can come to is the very same conclusion arrived at by the learned trial judge.

The next contention of the appellant's counsel touches on para 6 of the article which reads:

> 'This is the first knowledge I have of any international school being sued for anything,' says the administrator of another international school in Kuala Lumpur. 'Usually parents discuss problems with a teacher, and if that fails they go to the headmaster and come to some decision.'

On this paragraph, the learned trial judge said at p 265:

> In my judgment, this paragraph alluded to the unreasonableness of the plaintiff's parents who should have resolved the matter with the ISKL but failed to do so. ... The respondent had given an ordinary, reasonable reader the impression that the plaintiff's parents have not availed themselves of the opportunity to engage in discussion or meeting with the school but instead chose to proceed to litigation in court as the first priority, with the sole purpose of obtaining astronomical damages from the court, thereby giving the impression of the unmitigated greed on the part of the plaintiff and his parents ... This was certainly an adverse, baseless and unwarranted criticism of a party having a matter pending before this court and was clearly sub judice. I therefore find this paragraph contemptuous.

The main thrust of the appellant's contention on this paragraph is that the learned trial judge failed to apply the correct test. As I had already dealt with the issue of what is the correct test above, there is therefore no necessity to repeat it here. As regards the contents of para 6, the statement of claim shows clearly that several opportunities were given to the school and the teacher, Miss Dean, to make amends. In the light of this, I am of the view that the learned trial judge was right in his conclusion.

The next paragraph of the article which became the subject of the appellant's comment is para 9 which says:

> In a separate 12-page letter to the court Govind's father says team-mates discriminated against his son because they 'never forgave Govind' for the victory that qualified him to compete in Taipei.

Of this paragraph, the learned trial judge concluded at p 266:

> In my judgment, this was an absolutely serious and blatant lie perpetrated by the respondent against the plaintiff and his parents in that the respondent had categorically and baselessly stated that Govind's father, namely Dato' Gopal Sri Ram, a judge of the Court of Appeal, had written a 12-page letter to the court, when indeed there was no such letter written. ... There was no doubt that this paragraph written by the respondent was calculated to give a clear and undoubted impression to an ordinary, reasonable reader that the plaintiff's father had communicated with this court by way of the 12-page letter for the purpose of bringing about an influence upon this court, so that this court would come to a decision in favour of the plaintiff, thereby

A constituting an interference by the plaintiff's father, who is a judge of the Court of Appeal , in the administration of justice. ... It was the impression an ordinary, reasonable reader of the article will gain by reading the article. The respondent was all out to destroy the plaintiff and his parents for bringing the action and directly to charge and impute our judiciary with bias.

B Again, the appellant's counsel contended that the conclusions of the learned trial judge was wrong as he had applied the wrong test. For the reasons already stated earlier on in this judgment, I find that the learned trial judge had applied the correct test. I also find that the learned trial judge's judgment on para 9 is correct and sound. In the case of *Re Read & Huggonson (St Jame's Evening Post Case)* (1742) 2 Atk 469, the court held C that:

> Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard (vide *Baker v Hart* at p 488; *Mrs Farley*'s case 2 Ves 520) ... There may be likewise D a contempt of this court, in abusing parties who are concerned in causes here. ... There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.

Re Read's case was referred to in *A-G v Times Newspapers* Ltd [1974] E AC 273 — a case submitted by the appellant's counsel. The case of *A-G v Times Newspapers* Ltd also referred to the case of *Hunt v Clarke* (1889) 58 LJQB 490 (CA) wherein Cotton LJ said:

> .... and, in my opinion, it does technically become a contempt if pending a cause, or before a cause even has begun, any observations are made or F published to the world which tend in any way to prejudice the parties in the case, and it may be that in such a case whoever is guilty of such an act would be liable to be committed. ... If any one discusses in a paper the rights of a case or the evidence to be given before the case comes on, that, in my opinion, would be a very serious attempt to interfere with the proper administration of justice. It is not necessary that the court should come to the conclusion that a judge or a jury will be prejudiced, but if it is calculated to prejudice the proper G trial of a cause, that is a contempt, and would be met with the necessary punishment in order to restrain such conduct.

And *Re The William Thomas Shipping Co Ltd*; HW Dillon & Sons Ltd v The Company & Ors [1930] 2 Ch 368 (cited by the respondent), Maugham J said:

H

> ... I think that to publish injurious misrepresentations directed against a party to the action, especially when they are holding up that party to hatred or contempt, is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to, for a like reason.

I

A-G v Times Newspapers Ltd also quoted a passage from the judgment of North J in *Re Crown Bank; Re O'Malley* (1890) 44 Ch D 649 at pp 651–652 which reads:

> But when, with notice that the petition had been presented, the newspaper deliberately took one side in the controversy, and took on itself to foretell what the result would be, in my opinion there was a gross contempt of court. It was doing what might interfere with the course of justice. ... The only object for which such a paragraph could be inserted must be to influence persons who might read it, and induce them to take one side. It was not, therefore, an impartial statement — even if that could be allowed — but it was a deliberate adoption of the view of one of the parties.

With these aforementioned authorities in mind, I find that the learned trial judge was perfectly right in the conclusions he made regarding paras 6 and 9 — more so when read as a whole and especially so when the words particularly 'suing mood' at the bottom of the photograph in the article is taken into consideration.

In the light of the analysis in the preceding paragraphs and after considering other submissions of the counsel for both parties, I find that the learned trial judge had written a well considered judgment. He had meticulously considered the relevant facts and authorities. After a thorough close scrutiny of his learned judgment, I find it impossible to disagree with his conclusions. I agree with the learned trial judge when he held that the respondent had established beyond reasonable doubt a case of contempt of court against the appellant. Even applying 'the real risk test', I am of the view that a reading of the article as a whole will still show beyond reasonable doubt that the appellant had committed contempt. The discussion in the preceding paragraphs have shown that there were real risks of prejudice to a fair and proper trial of the respondent's pending suit. Perhaps, the following passage from Humphreys J's judgment in *Delber-Evan* will strengthen my view that a case of contempt had been made out against the appellant even though the 'real risk test' is adopted at p 172:

> ... He is a human being, and while I am not saying for a moment that it is likely that any judge would give a decision which he would not have given but for information which had been improperly conveyed to him, it is embarrassing to the judge that he should be told matters which he would much rather not hear and which make it much more difficult for him to do ... his duty, ... It seems to me that the bringing before ... the minds of judges who have to try an appeal in a criminal case matter which they do not desire to know, and which, if it is forcibly brought to their attention, is likely to prejudice them in the fair and impartial consideration of the case, is wrong. Whether that is right or not, I cannot say; it is my own opinion and I express it as such, and no judge with long criminal experience, I venture to think, will fail to be able to recall instances in which it has had the effect of making the task of a judge extremely difficult, and no one has the right to publish matter which will make the task of a judge more difficult.
>
> I fully agree with my Lord (and ... I share his view as to its importance), that jurors are not the only people whose minds can be affected by prejudice ... One of the evils of inadmissible matter being disseminated is that no one can tell what effect a particular piece of information may have upon his mind ... why should one be embarrassed by having matter such as this put into one's mind, the effect of which it is impossible to estimate or assess.

A *Sentence*

After recording a conviction against the appellant, the learned trial judge proceeded to impose a sentence of three months imprisonment on the appellant.

B It was argued for the appellant that the learned trial judge placed undue reliance on the fact that the appellant's wife worked at the school. That fact, it was contended, was clearly insufficient to attribute intent to the appellant. Consequently the learned trial judge erred in sentencing the appellant on the basis that he was intentionally in contempt.

C The learned trial judge had stated in his judgment that the mental element of the appellant:

> ... must be determined by reference to all the circumstances of the case ... including, most importantly, the content of the article in question.

D Paragraph 2 of the article refers to the quantum of damages sought by the respondent. The article's paras 12 and 13 refer to other cases involving various quantum on damages. Paragraph 5 then talks of the consequence of 'hefty award'. Paragraphs 6 and 9 of the article, including the words 'suing mood' underneath the photograph, describe the nature of the respondent. The article's para 3 shows the court's quick action in hearing the case within less than seven months from its inception. All these coming from the

E appellant whose wife was at the relevant period working with the school which is the opposite party in the respondent's suit make it impossible for any ordinary reasonable person to believe that the appellant did not have, in the words of the learned trial judge, 'the deliberate intention to commit contempt of court'. With respect, I agree with the learned trial judge that the appellant had intentionally committed the offence of contempt of court.

F As to the appellant's contention that the learned trial judge was 'wrong to suggest that media contempt was more serious than the deliberate flouting of a court order', I am of the view that, for the reasons stated in his judgment, the learned trial judge was right in concluding so.

G The learned appellant's counsel had also referred us to several authorities in support of his contention for a non-custodial sentence. Most of the cases referred to us are cases which are not on contempt of court by media. One of the cases referred to by the learned counsel is the case of *R v Thomson Newspapers Ltd & Ors; ex p Attorney General* [1968] 1 All ER 268. This is a 'media contempt' case. Unfortunately, the issue therein is on the question of penalty to be imposed on the publishers, printers and editor.

H The learned counsel also referred to the case of *R v Bolam; ex p Haigh* (1949) 93 SJ 220 which was cited in paras 5–109 of *Arlidge, Eady & Smith on Contempt* (1999 edition). This case involves a media contempt case and the editor responsible was imprisoned for three months. The newspaper *Daily Mirror* in that case stated that a man who had been charged with murder had committed other murders and named his alleged victims. It is

I to be observed that the nature of the contempt committed is not of scandalizing the court as committed by the appellant before us. As to the Singapore case of *Attorney General v Pang Cheng Lian & Ors*

[1975] 1 MLJ 69 referred to us by the appellant, I would only refer to what Wee Chong Jin CJ said at p 74 of the report, that is:

> In the view I take of the offending article, it is highly regrettable that this court, where the contempt of court is conduct of the kind described as scandalizing the court, is unable to deal with those who are far more responsible for its publication and in particular the actual author of the offending article because they are out of the jurisdiction of this court.

As such, the case is of not much assistance in dealing with sentencing of contemnors like the appellant before us. The learned appellant's counsel also referred us to another Singapore case of *Attorney General v Fred Zimmerman & Ors* [1986] 2 MLJ 89. As to this case, I agree with the trial judge's comment of the case which is to the effect that the facts that constitute contempt therein was committed after the trial was over. The Singapore case of *Attorney General v Wain & Ors (No 1)* [1991] 2 MLJ 525 referred to us by the appellant does not involve the writer of the contemptuous article like the appellant before us.

I do not propose to comment on the other cases referred to us by the appellant as those cases are not on contempt of court by media.

In *Re Sin Poh Amalgamated Ltd & Ors* [1954] MLJ 152 (which involves contempt of court by a newspaper) (referred to us by the appellant) Murray-Aynsley CJ said at p 153:

> Propaganda in favour of one side or the other may affect public opinion and excite popular prejudice. If ultimately the result of the proceedings is not in accordance with the prejudice so excited, the result is likely to cause the public to lose confidence in the courts.

Bearing in mind this remark of Murray-Aynsley CJ, I cannot, consequently, say that the custodial sentence imposed by the learned trial judge is inappropriate. The learned trial judge had examined various authorities which support arguments for and against custodial sentence. After doing so, he concluded:

> In my view, for far too long there appears to be unabated contemptuous attacks by and through publications or the media on our judiciary as shown in the aforesaid cases brought to our courts for scandalizing the courts ... However, it is high time that our judiciary shows its abhorrence to such contemptuous conduct as is illustrated by the facts of this case.

I agree with the learned trial judge.

In mitigation, the learned counsel for the appellant submitted that the appellant has been here since the trial in 1997 and has not been allowed to leave this country since. He regrets for what he has done and that he is a first offender. In the circumstances, I feel that the appeal on sentence should be allowed in that the term of imprisonment shall be reduced to a period of six weeks with effect from today.

The appeal against conviction is hereby dismissed. I also order the appellant to pay the costs of this appeal.

Denis Ong JCA: In the capacity of mother and next friend of her son Govind Sri Ram, the respondent sued Julie Dean and Gail A Vandeland as

chairman and on behalf of the International School of Kuala Lumpur ('ISKL') in Shah Alam High Court Civil Suit No 22–210–96 ('the said suit') for a declaration that the latter had unlawfully discriminated against her son, and for damages. In the course of the trial of the said suit in the High court, the appellant, a Canadian citizen and a correspondent of the Far Eastern Economic Review ('FEER') based in Kuala Lumpur wrote an article headlined 'See You in Court. A series of civil suits suggests growing litigiousness' ('the said article') with a picture of the respondent and her son. The said article was published in the 23 January 1997 issue of the FEER.

Following the publication, the respondent took up committal proceeding under O 52 of the Rules of the High Court 1980 seeking to commit the appellant to prison for the several contempts of the High Court in the said article allegedly committed by him in the writing and publication of the said article. Proceeding was entirely by way of affidavit evidence from both sides. No oral evidence was led whatever. On 30 May 1997, the appellant was found guilty and was convicted by the High Court of contempt (see *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240 (HC)). On 4 September 1997, he was sentenced to three months' imprisonment. Against the entire decision of the High Court, he appealed to this court. So much for the facts of the case and the background of this appeal.

Preliminary issues apart, the main questions on the merits of the committal proceeding for decision are:

(1) Whether the said article was a contempt of the High Court, and if it was,

(2) Whether the appellant was guilty of such contempt in respect of writing and publishing the said article in the FEER.

On question (1), the High Court held that the said article constituted contempt of court for two reasons: (a) because it was written in respect of proceeding in the said suit which was subjudice and the respondent was the plaintiff; and (b) because it scandalized the High Court, contained threat, intimidation and interference with such proceeding, attributed wrongfulness to the plaintiff, perpetrated serious and blatant lies and pressurized the court in paras 3, 4, 5, 6, 9, 12, 13 and 14 which acts taken individually or cumulatively, were calculated by its publication to bring the High Court or the judge into disrespect or contempt or to lower or undermine his authority.

On question (2), the High Court found the appellant guilty because contempt of court generally and publication contempt in particular, as in the instant case, was an offence of strict liability where intention on the part of the contemnor was irrelevant, so long as he had published the said article which had all the ingredients alluded to above. Consequently, it was no defence for the appellant to contend that he did not know or think or intend that the said article was contemptuous or that he had some other motive for publishing it.

Before us Mr Cecil Abraham, learned counsel for the appellant, submitted that the said article read as a whole was not a contempt of court. He did not dispute reason (a), namely that proceeding in the said suit of

which the respondent was the plaintiff, was subjudice. His dispute was focused on reason (b) and the complaint was that the High Court erred in considering paragraphs of the said article in isolation contrary to the case advanced by the respondent in the notice of motion and statement, namely that the said article read as a whole was contemptuous and also contrary to the approach indicated in *Ambard v AG for Trinidad and Tobago* [1936] AC 322 (PC) at p 330 and *Lim Kit Siang v Dato Seri Mahathir Mohamad* [1987] 1 MLJ 383 (SC). In the result, he said that the conclusions arrived at by the judge did not arise from the said article read as a whole. In this regard, he singled out the analysis and conclusions of the High Court on paras 3, 4, 5, 6, 9, and 12 and 13 together.

Dato' Kam Woon Wah, learned counsel for the respondent, did not dispute that the proper approach was to read the said article as a whole. That, he said, was what the learned trial judge did. On the other hand, he added that the judge had to analyse the said article paragraph by paragraph for he would be criticized if he had not done so. He referred to certain passages in the judgment to show that the judge complied with both. He supported the findings of the judge on paras 3, 4, 5, 6, 9, and 12, 13, and 14 of the said article and his finding on the said article read as a whole.

Although it would be desirable, it is not possible to reproduce the entire text of the said article in this judgment because of its length and picture. It should be enough if I give some idea of its setting and reproduce the text of only the disputed paragraphs. The said article takes up a full page of p 22 of the FEER in relatively small print. It is laid out in unnumbered paragraphs in three vertical columns. The middle column is disjointed by the insertion of a full length picture of the respondent and her son, taken within the premises of the Shah Alam High Court building, above a caption which reads 'Suing mood: Student Govind and his mother take a school to court'. At the top of p 22 is written the word 'REGION' and immediately below that 'MALAYSIA' followed by the main headline, subheading, and the name of the writer thus:

> See You in Court
>
> A series of civil suits suggests growing litigiousness
>
> By Murray Hiebert in Kuala Lumpur

It makes for convenient reference in this judgment if I follow exactly the same numbering of the paragraphs of the said article used to identify them in the High Court, that is to say, para 1 to 14 starting from the opening paragraph in the first column on the left hand side and ending in the concluding paragraph in the third column on the right hand side of p 22.

The text of the disputed paragraphs, namely 3, 4, 5, 6, 9, 12, 13 and 14 of the said article read thus:

> 3 The case has sparked intense interest among legal circles, educators and foreign investors in the Malaysian capital. For starters, the thin bespectacled student, Govind Sri Ram, is the son of a prominent Court of Appeal judge, Gopal Sri Ram. And many are surprised at the speed with which the case raced through Malaysia's legal labyrinth. The trial began on 6 January, less than seven months after a writ was filed with the

A High Court. 'Normally, in a civil case, you're lucky to get a hearing within five years,' a veteran lawyer notes.

4 The main point of interest for lawyers is that the case is breaking new legal ground. 'It's the first time in Malaysian history that someone is suing on the basis of unfair discrimination,' notes one. 'Malaysia has no laws on discrimination.'

B

5 Educators are also following the case closely. A hefty award for the plaintiff would be a major financial burden on the school — and could hinder Malaysia's efforts to attract foreigners. The institution, after all, was established 30 years ago to educate the children of foreign businessmen and diplomats (young Govind is among the 7% of the school's 1,650 students who are Malaysian citizens, most admitted C because their parents have spent years working overseas).

6 'This is the first knowledge I have of any international school being sued for anything,' says the administrator of another international school in Kuala Lumpur. 'Usually parents discuss problems with a teacher, and if that fails they go to the headmaster and come to some decision'.

D 9 In a separate 12-page letter to the court, Govind's father says team mates discriminated against his son because they 'never forgave Govind' for the victory that qualified him to compete in Taipei.

12 A suit like Govind's may sound rather unMalaysian, but it's not the first. Consider the libel case brought in 1994 against journalist MGG Pillai by Berjaya Group Chairman, Vincent Tan. A judge heard the case within E seven months, then ruled that four articles which appeared in the monthly magazine *Malaysian Industry* in 1993 and 1994 were defamatory and calculated to disparage Tan's personal and business reputation. The upshot: Tan was granted RM2m in damages, the largest award in Malaysian legal history. Pillai lost his appeal, so he's headed for the Federal Court on 27 January.

F 13 In another case, two Malaysian companies, MBf Capital and MBf Northern Securities, filed a RM60m defamation suit on 10 January against lawyer Param Cumaraswamy over statements attributed to him by International Commercial Litigation in November 1995. The suit against Param was the 13th filed over the same article. Among the other suits it spawned, Berjaya's Tan sought RM100m in damages from legal firm Skrine & Co and its partner Tommy Thomas, and RM70m in G damages from Asian Wall Street Journal reporter Raphael Pura. (The Journal is owned by Dow Jones & Co, owner of the REVIEW).

14 Meanwhile, Govind Sri Ram continues studying at the International School of Kuala Lumpur, despite his suit. He's also back on its debate team, but teacher Dean is not his adviser. Govind initiated an injunction H against Dean in September, prompting the school to agree that she would not serve as coach as long as he is on the team.

In arriving at reason (b) above, the High Court made specific findings on the disputed paragraphs as follows:

(a) para 3 was calculated to give the impression to an ordinary reasonable I reader that the High Court had been manipulated or influenced by Dato' Gopal Sri Ram because he was a prominent Court of Appeal Judge — 'manipulated' in that the entire proceeding in the said suit was short circuited to accommodate him, and 'influenced' in that the

High Court had helped the respondent by giving an early hearing date for the said suit. Paragraph 3 was an accusation and a systematic attack by the appellant on the fairness and integrity of the High Court through its fixture process and thus was scandalous and contemptuous. The accusation was not true in substance or in fact and the attack was unwarranted and baseless.

(b) Paragraph 4 exceeded the bounds of an honest expression of opinion in that it lied in representing that Malaysia had no law on discrimination contrary to art 8 of the Federal Constitution and that the respondent's cause of action was founded on unfair discrimination instead of unlawful discrimination. The effect of such representation was that the said suit was vexatious and the High Court by continuing with the trial, gave the impression that it was unable to dispense justice with fairness and impartiality. Paragraph 4 was thus contemptuous. The said suit did not break any new legal ground. The appellant's claim that educationists and lawyers were discussing the novelty of the case was actually to stir up public opinion to gossip along that line so as to intimidate and pressure upon the court.

(c) Paragraph 5 contained a threat and intimidation to the High Court not to hand down a hefty award, else foreign investors would be driven away. The appellant's purpose was to pressure the court to throw out the said suit so that foreign investment in Malaysia would not suffer. The effect of such threat and intimidation was to make the High Court hesitant to find in favour of the respondent in the said suit. Paragraph 5 was thus calculated to divert the course of justice and an interference with the due process of law in the said suit. Read with para 14, they gave the impression that Govind was an ungrateful boy.

(d) Para 6 was contemptuous as it sought to influence the court to dismiss the said suit or to prejudice its mind by adverse criticism of unreasonableness, wrongfulness, culpability and greed to the parents of Govind, a party to the said suit which was pending and subjudice;

(e) para 9 was contumacious as it falsely accused Govind's father, a judge of the Court of Appeal, of interference in the administration of justice by communicating with the trial court by letter on the said suit to decide in favour of Govind when in truth he wrote no such letter to the court.

(f) the purpose in citing over fourteen defamation cases in paras 12 and 13 was to misinform the reader that the High Court in Malaysia could be pressurized into hearing cases within seven months as in the said suit.

It is common ground that in order to determine whether a given article is a contempt of court, the proper approach is to consider that article in its entirety. And in the case of an excerpt or passage from a speech published, the former Supreme Court states in the *Lim Kit Siang* case that such excerpt or passage must be carefully considered, viewed objectively and dispassionately and in the proper perspective to determine whether it constitutes a contempt of court. In the present case, I think the proper

A approach is to consider the disputed paragraphs in their proper context in the light of the said article as a whole and the effect on the ordinary reasonable reader.

It is observed that the said article writes at great length about the said suit including a picture of the respondent and her son. On the other hand, B it is also observed that not the entire said article is devoted to the said suit. From my reading and understanding of the said article as a whole, the particular topic that the appellant writes about is the topic of litigation in Malaysia expressed in colloquial language in the main headline 'See You in Court' and the theme is the growing litigiousness of the Malaysian people, as he sees it, which is summed up in the sub-heading 'A series of civil suits C suggests growing litigiousness', the caption 'Suing mood: Student Govind and his mother take a school to court', and the first full sentence of para 12. He begins the said article by comparing and observing in para 1 that Malaysia is far behind the United States but is following in that direction. And in support, he names later in paras 12 and 13, a spate of recent suits commenced in the Malaysian courts. They are firstly, the libel suit which D Berjaya Group Chairman Vincent Tan brought against MGG Pillai, a journalist; secondly, the thirteen defamation suits which MBF Capital and MBF Securities filed against Param Cumarasamy, a lawyer; and thirdly, the other suits which Vincent Tan filed against Skrine & Co, a law firm, and its partner Tommy Thomas and against Raphael Pura, an Asian Wall Street E Journal reporter.

A feature common to these suits, he notes, is the huge amount of damages claimed and, in the case of the first named suit, a brief period of about seven months for that suit to be tried. He discerns from these, the emergence of a certain new trend in litigation and a growing consciousness in litigation in Malaysia whose people in general are by nature not given to F litigation. He mentions nothing more of the United States on these aspects and assumes the knowledgeability of his readers.

The said suit, the trial of which was then in progress, strikes him as one relevant to the topic and theme, particularly in the record amount of damages claimed and in the brief time-frame of less than seven months G which it takes to be tried. Accordingly, he picks on the said suit to write about it in detail in paras 2, 3, 5, 7, 8, 9, 10, 11 and 14 and also to voice the concerns reportedly of certain sections of the community in Kuala Lumpur in paras 4, 5 and 6 of the said article who apparently are perplexed by the repercussions from the said suit.

H Paragraphs 7, 8, 10 and 11 set out the claims and defences of the parties, the materials for which are expressly stated to have been derived from the pleadings to which the appellant had access. There is no dispute as to the contents of these paragraphs.

Paragraph 3 contains three points, namely:

I (i) the intense interest which the said suit has reportedly generated among legal circles, educators and foreign investors who constitute sections of the community in Kuala Lumpur;

(ii) it describes Govind as thin and bespectacled in the accompanying picture and gives his personal background, ie that he is the son of a prominent Court of Appeal judge who is identified as Gopal Sri Ram; and

(iii) the trial of the said suit is unusually fast, less than seven months from the filing of the writ, to the surprise of many in the legal circles, educators and foreign investors, having regard to the long line of litigants awaiting dates of trial of their suits which he describes in figurative language as 'Malaysia's legal labyrinth'. The norm is reportedly five years or more.

The appellant elaborates on point (i) in paras 4, 5, and 6 of the said article. The interpretation of these paragraphs is disputed between the parties. The contents of these paragraphs and those of paras 9, 12, 13 and 14 have to be carefully considered and viewed objectively and dispassionately and in the proper perspective of the said suit which was then subjudice and of the topic and theme of the said article.

Paragraph 4 expresses the views reportedly of the lawyers. In content, their views touch on two matters, firstly whether Malaysia has or does not have any law on discrimination; and secondly, whether there is a cause of action in 'unlawful discrimination' or 'unfair discrimination' both expressions being used in the proposed statement of claim of the respondent in the said suit. They are matters of law and fact which as lawyers they are entitled to have their own views. Their views on the first matter is quoted in a sweeping statement that Malaysia has no laws on discrimination. That is in no sense a reasoned view of the matter. The lawyer concerned is not identified and nothing is known of his standing in the local Bar. It is not the official view of the Bar expressed through and appropriately acknowledged by the Bar Council. No one, I believe, would seriously act on a sweeping statement by such an anonymous lawyer. On the second matter, their comment is on a point of fact that the said suit is unprecedented in Malaysia and in that sense, is breaking new legal ground. In the overall context of the topic, the expression of their views, rightly or wrongly held, as reported in para 4 would come under the exercise of their individual right to freedom of expression as a citizen of Malaysia. That right is however subject to restrictions imposed by the common law of contempt, in particular, the subjudice rule in relation to the said suit the trial of which was then in progress. The fact that their views on the first matter may or may not coincide with that of the court is beside the point. They may not have known better until art 8 of the Federal Constitution and the many locally decided cases have been pointed out to them. The issue as I see it is what possible impact can their reported views have on the said suit or its outcome. As I understand the judgment of the High Court, there is no legal issue raised on the ground that Malaysia has no law on discrimination or that the said suit is not founded on any law. Consequently, the High Court is not called upon to make any decision on that score. In relation to the relief of a declaration prayed for, that rests with the exercise of the discretion of the High Court who may or may not grant it, art 8 of the Federal Constitution notwithstanding. In the premises, I am of the view that para 4

A is immaterial and could have no impact on the outcome of the said suit and thus has not offended the subjudice rule.

Paragraph 6 expresses the concern reportedly of an unidentified school administrator of another international school. As he or she knows it, the usual forum to settle student problem is for parents to discuss with the B teacher or with the headmaster. Bringing the student problem to the court for the first time for a solution as in the said suit, creates a precedent and the question arises as to what further relevance, if any, of the parent-teacher forum.

In relation to the theme, the concern which this school administrator voices of the relevance of the parent-teacher forum which para 6 reports, C that is the expression of his or her views as a school administrator which he or she is entitled to. The concern expressed seems to be over the repercussion of the said suit on the rapport of the parent-teacher forum which is the link between the parents of students and the schools. In that light, the concern expressed is not remote or unreal and is one of limited community interest. Nonetheless, the exercise of such right is subject to the D subjudice rule. I ask the same question here as before, namely what possible impact can the content of para 6 have on the said suit or its outcome. The point here is whether the parent-teacher forum is an issue which the High Court is called upon to decide at the trial of the said suit. There is nothing in the judgment of the High Court bearing on this point and the defence of E ISKL is no where to be found in the appeal record. From paras 10 and 11 of the said article, it looks to me that the dispute centres on whether Govind should have been included on grounds of merit in the ISKL debate team to Taipei and if he should, whether ISKL has discriminated against him unfairly or unlawfully by dropping him at the eleventh hour from such team. If paras 10 and 11 are anything to go by, it is plain to me that the parent- F teacher forum is not a point in issue, is immaterial and could have no possible impact on the said suit or its outcome. Thus, para 6 has not offended the subjudice rule. Neither do I think that the contents of para 6 expressly or by implication casts aspersion upon the parents of the respondent, a party to the said suit.

G Paragraph 5 expresses the views reportedly of the educators and foreigners of ISKL, not those of the educators or foreigners of independent schools generally as learned counsel for the appellant Mr Shafee reads it. It follows from this that I entirely disagree with his submission that para 5 does no more than refer to the possible consequences of a large award of damages and as such is extremely legitimate conjecture in an article about the effect H of an increase in litigiousness. Their chief concern is the repercussion of a hefty award in favour of Govind and against ISKL and also on the foreigners of ISKL. As they see it, ISKL is a school established 30 years ago mainly for the education of children of foreigners. Participation of children of locals is limited to 7% of whom Govind is one. A hefty award in favour of Govind must mean a major financial burden on ISKL and it could also hinder I Malaysia's effort to attract foreigners.

I identify the contents of para 5 as solely referable to ISKL and the educators concerned are those of ISKL although unnamed. In this respect,

they are a party to the suit and should have exercised restraint from making any comment in relation to the said suit, the trial of which was in progress. One of the issues which the High Court must decide at the trial is specifically the issue of damages of RM6m prayed for. For the educators of ISKL and the appellant as FEER correspondent to ventilate their views on the possible consequences of a hefty award, at that stage of the trial is, to my mind, prejudging the issue of a hefty award in favour of Govind and against ISKL and warning the High Court to think twice before it decides to do so in view of the possible consequences. Insofar as para 5 purports to prejudge the issue of damages which is to be assessed at the trial, that in my view is a usurpation of the proper function of the High Court. I agree with Mr Abraham that the wording of para 5 is not in the form of a threat but I agree with the High Court that the content of para 5 insofar as it warns of the possible consequences that has the effect of a threat, subtle and veiled, made in the course of the trial. In that regard, I agree with the finding of the High Court that para 5 is calculated to divert the course of justice and an interference with the due process of law.

Point (ii) of para 3 is factual. Point (iii) is non factual: it is firstly, a comment on the marathon queue of litigants and the long waiting period which they have to endure for their suits to be tried which the appellant describes metaphorically as a 'legal labyrinth' and secondly, a criticism of the High Court for undue haste in the trial of the said suit. The problem lies with the word 'And'. Mr Abraham says that point (ii) and point (iii) should be read disjunctively and separately, not conjunctively. In this connection he contends that the fact that Govind is the son of a Court of Appeal judge by itself has sparked intense interest among legal circles, educators and foreign investors. In other words, point (ii) can be read with point (i) but not with point (iii). He is not wrong so far as ideas are concerned; point (ii) talks of the personal background of Govind and point (iii) of the long queue and waiting time and of undue haste in the trial of the said suit. The ideas in point (ii) and point (iii) appear to be separate, unrelated and incoherent and should properly have been in separate paragraphs if they were intended to be read separately. But the fact is that they are in one and the same paragraph. The expression 'For starters' apply to both point (ii) and point (iii) and these points are connected to one another by the word 'And'. 'And' in that context is a conjunction used to introduce a statement expressive of surprise. For this reason and with respect, I disagree with learned counsel. In my view, point (ii) and point (iii) should be read together.

The quote from the unnamed lawyer in point (iii) suggests that ordinarily, for a suit to be tried will take five years or more and he attributes it to luck if the trial is actually had within five years. The said suit takes less than seven months to go to trial — a big time gap of about four and a half years. How the respondent is able to bridge that gap is a matter of surprise to many lawyers, ISKL educators and the unnamed school administrator. It is here that the personal background of Govind in point (ii) becomes relevant. So read, they convey to readers a strong suspicion that the problem of a long wait for trial of the said suit could not have been overcome without the intervention of the High Court judge, and by his decision to grant an

A early trial, the High Court judge must have intervened to accommodate the respondent by virtue of the office of Govind's father as judge of the Court of Appeal.

It is the appellant's responsibility as a professional correspondent and as a feature writer of a feature article on the topic and theme of the said
B article, to research into the facts of how the early trial of the said suit came about. They are relevant to the topic and theme and essential to its balanced reporting. The topic and theme concern litigants as well as the court. The dignity of the court must be maintained and any criticism of the court must be fair, based on facts, not gossip.

The plain facts are that both sides in the said suit were represented by
C learned counsel at the hearing before the same judge in chambers of the respondent's application for early trial and both sides agreed to the date of trial fixed. And so it was ordered by the judge. If the appellant as a feature writer had done his research, as he deposed he had, then he must know precisely what the true position was and report factually and objectively in
D the said article. Had the appellant come out with the plain facts which I have alluded to, it would have been clear to one and all of the readership that what was reportedly a surprise to lawyers, ISKL educators and the unnamed school administrator was in fact no surprise at all and no suspicion cast on the impartiality of the role and decision of the judge or the High Court. Thus in my view, that criticism is both unfair and
E unwarranted. It is particularly damaging to the integrity and dignity of the High Court and mischievously vilifies both the High Court judge and Govind's father in their official standing. To that extent, I agree with its finding that para 3 has scandalized the High Court and is contemptuous.

Paragraph 9 contains two points, namely:

F (1) that Govind's father wrote a separate 12-page letter to the High Court; and

(2) that the contents of that letter says that team-mates discriminated against his son because they 'never forgave Govind' for the victory that qualified him to compete in Taipei.

G The meaning of para 9 as it appears in the said article, and taken literally is clear to both sides and there is no dispute on that score. In short, para 9 means what it says and there is no need for me to repeat the obvious. Understood in that meaning, both Mr Abraham and Mr Shafee do not dispute the contention of Dato' Kam that factually point (1) is false in the
H sense that there is no such letter written by Govind's father to the High Court. However, they prefer to call it a mistake or a fault — not of the appellant, but of the sub-editor in Hong Kong. On this point, Dato' Kam argues that it cannot be a mistake because the said article has been read and checked by a senior lawyer in Kuala Lumpur and a media law expert in Hong Kong.

I As I see it, the dispute between learned counsel on both sides relate to the text of point (1) in para 9, more particularly, on the wording 'letter to the court' as it is published, or 'letter to ISKL' as it should have been. The issue to me is the meaning and effect of the published text of para 9. There

is no dispute as to the meaning of point (1) taken literally as I said before and no dispute also as to the content of that letter summarized in point (2). Both Mr Abraham and Mr Shafee submit that para 9 may have erroneously suggested that Sri Ram JCA had written to the High Court, but no comment is made criticizing him or suggesting impropriety. Dato' Kam reads para 9 with para 3 and submits that the implications are that the High Court judge has been directed to hear the said suit within seven months as opposed to the normal five-year period and that the High Court has no integrity and will allow the course of justice to be subverted. On this point, Mr Abraham replies that the lawyer quoted (in para 3) as suggesting a civil case delay of five years may have been factually mistaken, but that cannot amount to contempt (and no evidence was before the court as to the actual average delay).

Paragraph 9 follows from para 8. Paragraph 8 speaks of the allegations of the respondent in the writ and claim filed with the court. The letter to the court in para 9 is allegedly a letter by Govind's father to the court separate from the writ. In sequence, the writ is filed first followed by the letter afterwards. That is my understanding from reading paras 8 and 9. The clue to that is the word 'separate' in para 9. It is highly objectionable for a litigant to write direct to the court concerning his case which is pending in that court and his conduct may be regarded as scandalizing the court. Having regard to his background in para 3 as a judge of the Court of Appeal, Govind's father should have known better not to communicate direct with the High Court when the said suit is pending there. For para 9 to assert or to represent to readers that Govind's father wrote that letter to the High Court for no purpose other than to say to the High Court that team-mates discriminated against his son because they 'never forgave Govind' for the victory that qualified him to compete in Taipei would indeed be outrageous. It gives the impression that the High Court is under his thumb by virtue of his higher office and that he has interfered with the High Court to bring about a decision in favour of Govind. In that respect, para 9 is contemptuous.

Paragraph 12 makes three points namely that:

(a) the said suit may sound rather un-Malaysian;

(b) it is not unprecedented; and

(c) considers the defamation suit between Berjaya Group Chairman Vincent Tan and MGG Pillai. It notes that that suit was tried within seven months, the damages awarded is RM2m and that is the largest award in Malaysian legal history.

Paragraph 13 enumerates other defamation cases, namely:

(1) MBf Capital and MBf Northern Securities against Param Cumaraswamy for damages specified at RM60m and that it was the 13th suit against Param;

(2) Vincent Tan's suit against Skrine & Co and its partner Tommy Thomas for damages specified at RM100m; and,

(3) Vincent Tan's suit against Raphael Pura for damages specified at RM70m.

There is no dispute as to point (c) of para 12 and points 1, 2 and 3 of para 13. The point at issue between the parties is why is it necessary to mention these cases and the said suit in the said article. The High Court finds that the purpose of the appellant in citing them is to misinform readers that the High Courts in Malaysia can be pressurized into hearing cases within seven months and that the said suit is an instance where the court is so pressurized. Mr Abraham points out that the only place where the 'seven month' period is mentioned is in Pillai's case in point (b) and that case creates a precedent for early trial which is not something improper as the Court of Appeal says in that case. Consequently, he submits that there is no basis for the High Court's finding. Dato' Kam supports the High Court's findings. He argues that in paras 12 and 13, the appellant compares the said suit with Pillai's case both of which are heard within seven months and that a large amount of damages has been awarded, giving rise to the implications firstly, that Malaysian courts favour and will be quick to expedite cases of prominent personalities and are prepared to grant unusual and exceptional damages in these cases; and secondly, that the courts in general are biased in favour of prominent personalities.

With respect, I differ from Dato' Kam. His submission seems to disregard points (a) and (b) of para 12, takes no account of the topic and theme the appellant writes and the points he makes in his opening para 1. In short, as the Supreme Court said in *Lim Kit Siang*'s case, paras 12 and 13 should be carefully considered, viewed objectively and dispassionately and in the proper perspective. As I understand these paragraphs, the only reason or purpose of the appellant making references to 14 other defamation cases is to prove points (a) and (b) of para 12. In this regard, evidently the appellant has researched into these cases and the said suit. He lists out in detail the figures for damages. In the suit against Param Cumaraswamy, the figure is RM60m, against Skrine & Co and Tommy Thomas it is RM70m. In the suit against Pillai, the figure awarded for damages is RM2m which the appellant remarks, is the largest award in Malaysian legal history. A feature of litigation, he notes, between these cases and that of the said suit is the huge amount of damages claimed, and in Pillai's case, awarded. In addition, he also notes a like period of seven months from commencement to trial in Pillai's case and the said suit. In these respects, it is the appellant's views that the said suit is not without precedents and these suits together suggest a growing litigiousness in Malaysians which suits hitherto would have been regarded as 'un-Malaysian'. Paragraphs 12 and 13 relate to the topic and theme and tie up with the points he makes in the opening para 1 of the said article. The purpose of referring to these cases in relation to the said suit is, to my mind, to substantiate points (a) and (b) and the overall topic and theme he sets out to write about. For these reasons and with respect, I disagree with the finding of the High Court on paras 12 and 13.

Paragraph 14 informs that during the intervening period, ie from the commencement of the said suit to its trial, Govind:

(a) continues to study at ISKL;

(b) is back on ISKL's debate team; and

(c) Dean is not his adviser because Govind initiated an injunction against Dean in September which prompted ISKL to agree that Dean would not serve as coach as long as Govind is on the team.

The contents of para 5 have earlier in this judgment been referred to. The High Court agrees with the submission of Dato' Kam that para 14 should be read with para 5, more particularly in relation to the claim therein that ISKL is an institution established for the education of children of foreigners and that Govind is but one of the 7% of children of locals admitted to ISKL. So read, the High Court finds that the effect is to give to readers the impression that Govind is an ungrateful boy who, despite being given such opportunity, has sued the ISKL and obtained an injunction against ISKL barring Dean to act as his coach.

The basic issue which arises from the submissions of both sides is whether the High Court is right to read para 14 with para 5 to come to its finding of ingratitude on the part of Govind. Mr Abraham says that the High Court is wrong; the said article should be read as a whole. He argues that if para 14 can be read with para 5, it is equally possible to read it with paras 7 and 8 of the said article. So read, the message to readers is that Dean would not be his adviser and coach by virtue of the pending litigation against Dean and the allegations made against Dean in the said suit. He says that the notion of grateful or ungrateful does not arise. Paragraph 14 according to him is factually true and breaches no court order against publication. It merely states that Govind initiated an injunction against Dean prompting ISKL to agree that she would not serve as coach as long as Govind is on the team; it does not state that there was an injunction to prevent Dean from coaching Govind. Dato' Kam connects the content of para 14 with that of para 5 and says that the former is to be read with the latter. Paragraph 5 states that ISKL is meant primarily for foreign children and he says that the implication to be drawn from reading the two paragraphs is that Govind should be grateful to ISKL but instead has sued the school. He is silent on the injunction.

In my view, the sole purpose of the appellant in writing para 14 is to inform reader in brief of what happened to Govind's education at ISKL from commencement to trial of the said suit. Reading the said article as a whole without para 14, readers would be at a loss to know of what happened to Govind's education while litigation is pending in view of the confrontation between the parties and the ex parte injunction against Dean from acting as adviser and coach to Govind in the debate team. The point here is how are these problems resolved to avoid disrupting Govind's education. In that light, para 14 should be read in the context of paras 2, 7, 8, 9, 10 and 11, not para 5. Paragraph 5 itself states that ISKL is an institution established 30 years ago to educate the children of foreign businessmen and diplomats, in short, a prestigious school, not a charitable institution. Nor is there anything in the said article to suggest that Govind's education is gratis to give rise to the impression that Govind is ungrateful. The quota of 7% must have been fixed by the Education Ministry and his admission to ISKL could only have been on the basis of means and merit.

A In the form of a summary, para 14 informs readers and concludes the said article. Factually, that summary seems fair and accurate. The statement that 'Govind initiated an injunction against Dean in September, prompting the School to agree that she would not serve as coach as long as he is on the team', in my view, summarises fairly and accurately the compromise on both sides having regard to para 11E of the proposed amended statement of B claim, to overcome a deadlock in order to enable Govind to resume participation in ISKL debate team. In the view I take of para 14, I must with respect differ from the finding of the High Court and Dato' Kam's submission.

Making allowances for the disputed paras 4, 6, 12 and 13 and taking C into account paras 3, 5 and 9 and the effect of the said article as a whole on the ordinary reasonable reader, in my judgment the said article constituted contempt of the High Court. I agree with the holding of the High Court on question (1). I agree with reason (a). I also agree with reason (b) to the extent that it scandalized the High Court, contained threat, pressure and interference with the trial of the said suit and is calculated to bring the High D Court or the judge into disrespect or contempt or to lower or undermine his authority.

On the holding of the High Court in respect of question (2), the matters in dispute between the parties are two fold, namely:

E (a) whether mens rea is an essential ingredient of the common law offence of contempt of court, and;

(b) the burden and standard of proof.

On matter (a), Mr Shafee makes two points: firstly, that mens rea is a necessary ingredient in all four categories of common law contempt F especially media contempt and that the law required strict proof of mens rea; and secondly, that the High Court erred in finding that criminal contempt, including 'scandalizing the court' was a strict liability offence. In support of his submission, he refers to *Arlidge, Eady & Smith on Contempt* (2nd Ed) and also to CJ Miller — *Contempt of Court* (2nd Ed).

Dato' Kam's stand is that mens rea is not a necessary ingredient to G establish liability for contempt. He says that mens rea is only relevant to sentencing. He cites *Reg v Odhams Press Ltd & Ors; ex p Attorney-General* [1957] 1 QB 73 and *AG, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 160 at p 180.

In relation to the facts of the present case, the issue of mens rea arises H from the appellant's admission in his affidavit that he is the writer of the said article and that he files a copy of it with FEER Head Office in Hong Kong. The said article went through normal editing by the editors of FEER in Hong Kong before it was published. He says in defence that it was not his intention in any way to prejudice the fair trial of the said suit, nor to prejudge its outcome in favour of the respondents; that he did not intend to I do more than report on a case of considerable public interest in the region; that he had no knowledge or belief that in January 1997 that any fact he stated or impression he gave was false; that he had no intention to excite prejudice against the respondent or to exert pressure on the High Court;

and that his sole purpose and motive of writing the said article was none other than what he had earlier stated in paras 6 and 7 of his affidavit. A

On matter (a), the High Court said at p 121 of the appeal record:

> In my considered view, I hold that in order to establish contempt of court as a result of publication scandalizing the court or interfering with the course of justice, as in the instant case, intention or mens rea on the part of the alleged contemnor is not an essential ingredient ... The test is whether the matter complained of had the tendency or was calculated to interfere with the due administration of justice, not whether the perpetrator intended that result ... I am of the view that contempt of court generally and publication contempt, as in the instant case in particular, is an offence of strict liability in which intention on the part of the contemnor is irrelevant, so long as he has published the article which has all the other ingredients alluded to above. B C
>
> In the light of the above authorities, it seems clear to me that it is no defence for the respondent to contend that he did not know or think or intend that the article was contemptuous or that he had some other motive for publishing.

D

Neither side has cited to us any decision of any Malaysian court directly in point on that issue except for a brief statement of Mohamed Yusoff SCJ in *A-G Malaysia v Manjeet Singh Dhillon* which I quote (at p 180):

> The Attorney General on the other hand contended that the respondent's honest intention is no defence. Among the cases he cited are: ... Similar views have been expressed in ... On this basis, I would accept the Attorney General's contention as a proper statement of the law. E

That issue arose in the Singapore case of *AG v Wain & Ors (No 1)* [1991] 2 MLJ 525 where Sinnathuray J at p 532 held:

> Intention: ... However, from the reported cases in the Commonwealth jurisdictions and the opinions of textbook writers, the balance of authority is that it is not necessary to have an actual intention to commit the contempt of scandalizing the court. The intention of the writer of the article complained of is irrelevant in contempt proceedings. I support this view because in English common law, mens rea is not an element that has to be proved to establish contempt and s 8(1) of the Supreme Court of Judicature Act, has incorporated that. So, when a person alleges bias against a judge, it is not necessary to prove that he intended to interfere with the administration of justice. What the court must do is to consider the effect the article complained of has, or is calculated to have, on the mind of the reader. The intention, however, is relevant to the penalty to be imposed. F G

In arriving at its holding, the High Court referred to various English cases decided before the Contempt of Court Act 1981 (UK), Australian, New Zealand and Canadian cases. Its holding on the matter (a) is no different from that in Wain's case and its finding is consistent with the statement of the law accepted by the Supreme Court in *Manjeet Singh Dhillon*'s case which is binding on the High Court and on the Court of Appeal. In this regard, I have also had recourse to CJ Miller — *Contempt of Court* Chap 9, pp 280–300, and also Chap 12, p 378. For these reasons I agree with the holding of the High Court and also with its finding that it is no defence for H I

A the appellant to say that he did not know or think or intend the said article to be contemptuous.

On matter (b), before us the point at issue between the parties is whether the High Court applied the correct test. In its judgment, the High Court stated at p 271:

B

> To constitute contempt of court, it was not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of offending statements. It is enough if it is likely or it tends in any way to interfere with the proper administration of justice.

Mr Shafee submits that the High Court applied the wrong test for the C contempt. The correct test he submits is that in *Reg v Duffy & Ors; ex p Nash* [1960] 2 QB 188 namely, that there must be a real risk of prejudice as opposed to a remote possibility which was adopted by Lord Reid in *A-G v Times Newspaper Ltd* [1974] AC 273 at p 298G and a number of very recent English cases and one Australian case. Dato' Kam submits that the High Court applied the correct test, namely the test of whether publication of the D said article tends or is likely to interfere with the administration of justice. He cites the local cases of *PP v The Straits Times Press Ltd* [1949] MLJ 81 and *Re Sin Poh Amalgamated Ltd & Ors* [1954] MLJ 152 where this test was consistently applied. He refers also to the position in Singapore (*Wain*'s case), Australian, Indian, Canadian and English position as well.

E It does not appear from the appeal record that the point of the real risk test in *Duffy*'s case taken before us here was canvassed in the High Court. The appeal record at p 248 records nothing more than 'Proof beyond reasonable doubt' and at p 256 the appeal record reads: 'Beyond reasonable doubt' means the words or publication complained of has the inherent tendency to prejudice the administration of justice'. The judgment of the F High Court makes no reference to or decision on the two tests and which one was the correct test.

In my view, where there are local decisions in point on an issue namely, the test to apply as in *Straits Times Press Ltd*, *Palaniappan* and *Sin Poh Amalgamated*, that is the test for the High Court to apply until overruled by G the Federal Court. In my view, therefore, the High Court had applied the correct test.

On the preliminary issues raised by the appellant, namely that the motion lacked particulars of the 'several contempts' complained of in the said article, the locus standi of the respondent to initiate committal proceedings against the appellant for contempt and the propriety of the H learned judge to hear such proceeding, I have had the benefit of reading the judgment in draft of my learned brother Ahmad Fairuz JCA. I entirely agree with him that there are no merits in these issues for the reasons given.

Lastly, on the appeal against sentence. I agree with the High Court that a custodial sentence is appropriate in the circumstances of the present case.

I One factor relevant to sentencing is the element of mens rea in the commission of the offence. Given his standing as a professional correspondent of FEER with more than ten years experience, the scope of

his duties which includes writing on interesting development in Malaysian law and the fact that he is the author of two books, I find it rather difficult to accept that the appellant was not aware that the said article which he wrote and published, was contemptuous. Further, the choice of the said suit to write about in the said article was one made consciously and with a purpose. To that end, the appellant attended the open court hearing for two days and read the court documents. By para 7 of his affidavit, he must be taken to be familiar with the limitation on reporting open court proceedings. But in the exercise of his judgment as a professional correspondent, he chose to venture perilously outside those limits. To my mind, his case is not one of mistaken exercise of judgment.

The other factor relevant to sentencing is the matter of apology. I accept that there was an expression of regret by the appellant given early in his affidavit and that was not discourteous or unbefitting having regard to the circumstances which were unclear to him at that point in time. I accept also that there was an offer to apologize by the appellant if he was told where in the said article he had offended. But there was no response to his offer. To my mind, this is not a case where the offender was unwilling to apologize.

Taking all these into consideration and discounting the disputed paras 4, 6, 12 and 13 of the said article which I dealt with earlier, a term of six weeks imprisonment would suffice.

For all these reasons stated, I dismiss the appeal against conviction and reduce the sentence from three months to six weeks imprisonment. Costs to the respondent. Order accordingly.

Appeal against conviction dismissed. Sentence reduced from three months to six weeks imprisonment.

Reported by Loo Lai Mee